Supreme Court, U.S.
FILED
OCT 13 1999
OFFICE OF THE CLERK

No. 99-265

# In the Supreme Court of the United States

ERIC NAKAMURA, ET AL., PETITIONERS

*v.*

BRUCE BABBITT, SECRETARY OF THE INTERIOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether a district court may hold a hearing pursuant to Federal Rule of Civil Procedure 43(e), to resolve a quasi-jurisdictional issue involving a factual dispute that would be tried by the court.

2. Whether a plaintiff alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, must first file an appeal with the Equal Employment Opportunity Commission from an agency's resolution of his administrative complaint.

3. Whether the law of the case doctrine prevents a district court from dismissing a claim brought under Title VII after trial because the plaintiff failed to include it in his administrative complaint, when the court had denied a pretrial motion to dismiss on the same ground.

4. Whether a district court may grant judgment as a matter of law in favor of an employer on a plaintiff's Title VII claim when the plaintiff introduces no evidence at trial to refute the employer's nondiscriminatory reason for its action or, in the alternative, when the plaintiff establishes pretext but fails to present evidence of retaliatory intent.

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### OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A129-A133) is unpublished, but the judgment is noted at 165 F.3d 916 (Table). The orders of the district court (Pet. App. A6-A19, A20-A48, A49-A116, A152-A169) are unreported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. A118) was entered on December 23, 1998. A petition for rehearing was denied on March 11, 1999. The petition for a writ of certiorari was filed on June 8, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In March 1995, petitioners Ronald Sato and Eric Nakamura, former employees of the Maintenance Division of Haleakala National Park (the Park), brought suit against the Department of the Interior. Pet. App. A6. The National Park Service (the agency), an agency within the Department of the Interior, operates the Park. Petitioners alleged racial discrimination by various Park employees in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. A6.[1]

Sato worked at the Park as a full time maintenance worker from January 1978 to January 1992, when he resigned. Pet. App. A14. He filed a complaint in this case which alleged that his supervisor, David Puu, subjected him to racial epithets, permanently assigned him to sanitation duties and gave him negative referrals when he sought to transfer to other positions, on account of his Japanese ancestry, in violation of Title VII. *Ibid.* Sato claimed that he informed an Equal Employment Opportunity officer of Puu's harassment in the late 1980s and that he was not told and did not know that he had a right to file an Equal Employment Opportunity complaint with the agency. *Id.* at A15-A16. Two years after he resigned, Sato filed an informal complaint, which the agency dismissed for failure to comply with the statutory time limits. *Id.* at A30-A31.

Nakamura worked at the Park as a temporary maintenance worker from 1989 until September 1994, when he was terminated, allegedly because the Park could no longer fund his position. Pet. App. A53-A54.

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[1] The order denying defendant's motion for summary judgment is reproduced twice in the appendix (Pet. App. A6-A19, A138-A151). References in this brief are cited to Pet. App. A6-A19 only.

Nakamura filed a complaint alleging, inter alia, that his co-workers retaliated against him and that he was ultimately terminated in violation of Title VII, on account of his involvement in a 1993 investigation of David Puu's alleged racial discrimination in supervising Park employees, which led to Puu's removal from his supervisory position. *Id.* at A22-A23, A36-A37. Nakamura's Title VII claim included allegations of co-worker and supervisor retaliatory harassment from April to September 1993 and March to September 1994, and retaliatory termination in September 1994. *Id.* at A26, A31-A32. Both before and after termination, Nakamura filed a number of administrative complaints with the agency, alleging retaliatory treatment by his co-workers and supervisors. His complaints did not allege retaliatory termination. *Id.* at A73, A74, A78-A79. On February 14, 1994, Nakamura and the agency entered into an informal resolution agreement concerning an informal complaint he had filed in November 1993. The agreement resolved his claims of retaliatory treatment between April and September 1993 and, among other things, reinstated 153 hours of his annual leave.[2] *Id.* at A39-A40.

2. a. On September 10, 1996,[3] the district court denied the agency's motion for summary judgment dismissing petitioners' Title VII claims. Pet. App. A2. The court denied summary judgment for Sato's alleged

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[2] On April 11, 1994, Nakamura and the agency entered into another informal resolution agreement concerning an informal complaint he had filed in February 1994, alleging retaliation in January and February of that year. Pet. App. A52-A53.

[3] Petitioners indicate that the date of the district court's decision is September 19, 1996 (Pet. App. A6). The correct date of the decision is September 10, 1996.

failure to exhaust administrative remedies, as required by 29 C.F.R. 1613.214(a)(1)(i) (1991), because it found a genuine issue of fact as to Sato's compliance with the regulation. Sato alleged that he told an Equal Employment Opportunity counselor about Puu's harassment in the 1980s, when it occurred on a regular basis, thereby fulfilling the regulation's notice requirement. Pet. App. A15-A16. The court also denied summary judgment dismissing Nakamura's Title VII claims in their entirety. It found that he had established a prima facie case of retaliation at least with respect to an allegation of harassment that allegedly took place after April 11, 1994, that the allegation was not resolved by any agreement Nakamura had made with the agency and that Nakamura had exhausted his administrative remedies with respect to it. *Id.* at A10-A14.

b. On February 20, 1997, the district court denied the agency's motion to dismiss Sato's claims for failure to exhaust—a motion on the same grounds as the agency's earlier motion for summary judgment—but converted that motion to one for summary judgment. Pet. App. A27. It then denied the motion due to the existence of disputed issues of fact and agreed to hold a hearing pursuant to Federal Rule of Civil Procedure 43(e) to resolve those issues.[4] Pet. App. A34-A35, A154. The court granted summary judgment dismissing Nakamura's claim that his co-workers retaliated against him from April to September 1993, for his role in the investigation and removal of Puu, finding that the claim was barred by the February 1994 informal resolution agreement between Nakamura and the

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[4] The court denied the agency's motions for hearings pursuant to Rule 43(e) to resolve several other issues raised by the agency. Pet. App. A27.

agency. *Id.* at A45. The court rejected on four independent grounds Nakamura's argument that he was entitled to revive his claim because the agency materially breached that agreement by failing to timely reinstate his annual leave. First, the court held that the agency did not breach because it restored his leave promptly upon learning of the oversight. Second, even if the agency did breach, Nakamura failed to exhaust his administrative remedies with respect to his claim because he failed to file his complaint with the agency within 30 days after learning of the breach, as 29 C.F.R. 1614.504 requires. Third, even if his delayed filing could be excused, he did not fulfill the remaining requirements of that regulation by filing a complaint with the Washington office of the National Park Service; and fourth, he failed to file a written appeal with the Equal Employment Opportunity Commission from the agency's resolution of his complaint under 29 C.F.R. 1614.504(b). Pet. App. A41-A44.

The court denied the agency's motion for summary judgment dismissing Nakamura's retaliatory termination claim for failure to raise that claim with the agency.[5] The court held that it could hear the claim because it was reasonably related to the allegations of adverse retaliatory action that Nakamura did raise in his administrative complaints. Pet. App. A45-A46.

c. The district court held an evidentiary hearing pursuant to Rule 43(e) on April 22 and May 28, 1997, to determine whether Sato failed to exhaust his administrative remedies. The Rule permits a court to hear a motion wholly or partly by oral testimony or deposition,

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[5] The court also resolved a number of other motions brought by the agency which are not relevant to the issues raised in this appeal.

as well as affidavits, when the motion is "based on facts not appearing of record." Fed. R. Civ. P. 43(e). The court explained that it was not deciding a summary judgment motion; it had previously denied the agency's motion for summary judgment on the exhaustion issue. Pet. App. A154. The court stated that an evidentiary hearing could be used to resolve that issue, because, though not "jurisdictional * * * per se," it was a legal issue for the court to decide, distinct from the merits of Sato's claims. *Id.* at A153. It also noted that because most, if not all, of Sato's claims concerned discrimination that occurred before the 1991 amendments to Title VII, which provide for trial by jury, 42 U.S.C. 1981a(c), his claims did not qualify for jury trial in any event. Pet. App. A156 n.1. On June 2, 1997, the court dismissed Sato's claims for failure to exhaust, primarily because it found Sato's claim that he had discussed Puu's discrimination with an Equal Employment Opportunity counselor in the 1980s to be incorrect, after hearing the counselor's testimony. *Id.* at A152, A163-A164.

3. Nakamura's remaining allegations of co-worker and supervisor retaliation from March to September 1994 and retaliatory termination in September 1994 were tried to a jury, which found in favor of the agency on the retaliation claim but in favor of Nakamura on the termination claim. The jury awarded him $30,000 in compensatory damages. Pet. App. A50-A51.

a. On October 31, 1997,[6] however, the district court granted the agency's motion to dismiss the retaliatory termination claim for lack of jurisdiction pursuant to

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[6] Petitioners indicate that the date of the district court's decision is October 30, 1997 (Pet. App. A49). The decision was signed on that date but filed on October 31, 1997.

Federal Rule of Civil Procedure 12(h)(3), because Nakamura failed to raise his retaliatory termination claim with the agency. It reconsidered its earlier decision denying dismissal of that claim and concluded the claim was insufficiently related to the claims Nakamura had raised in his administrative complaints. As a result, the court held that it lacked jurisdiction over the claim because Nakamura had not presented it to the agency. Pet. App. A59.

b. In the alternative, the district court held that the agency was entitled to judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50, on the retaliatory termination claim. Pet. App. A68 n.6. The court found that although Nakamura had established a prima facie case of discrimination, the agency had produced evidence supporting its claim that Nakamura was terminated for budgetary reasons and his own inability to work—legitimate, nondiscriminatory justifications. *Id.* at A71-A72. After carefully analyzing the evidence, the court held that Nakamura had failed to provide specific substantial evidence that the agency's stated reasons were a pretext for discrimination. *Id.* at A73. The court noted that Nakamura produced only one witness in support of his pretext claim, who lacked specific knowledge of the relevant budgetary decisions. *Id.* at A93-A94. The court therefore determined that the evidence permitted only one reasonable conclusion: that the agency had not discriminated against Nakamura. It therefore granted judgment as a matter of law to the agency.

c. In the alternative, the court stated that even if Nakamura had presented sufficient evidence of pretext, he still failed to sustain his ultimate burden with respect to retaliatory termination. The court noted that Nakamura's minimal prima facie case, "coupled

with what would have been, at best, an extremely questionable finding of pretext * * *," would have been insufficient to support a finding of retaliatory termination. Pet. App. A100. The court analyzed the evidence regarding retaliatory intent, *id.* at A100-A110, and concluded that Nakamura had "produced no evidence at trial from which a jury could have reasonably concluded that he was terminated as a result of unlawful retaliation rather than [the agency's] stated budgetary reason." *Id.* at A109.

4. The court of appeals affirmed in an unpublished opinion on December 23, 1998. Pet. App. A1-A5. It affirmed the decision to hold a hearing pursuant to Rule 43(e), stating that Sato had no right to a jury trial on the exhaustion issue. It upheld the dismissal of Nakamura's 1993 retaliation claims, for failure to provide notice of noncompliance to the agency within thirty days as required by regulation and because breach of the agreement was not material. It also upheld the post-trial dismissal of the retaliatory termination claim and upheld the grant of judgment as a matter of law, agreeing that Nakamura had failed to produce sufficient evidence of pretext. *Id.* at A2-A4. It denied rehearing and the suggestion for rehearing en banc on March 11, 1999.

**DISCUSSION**

The petition presents no significant issue warranting this Court's review. Two of the claims raised by petitioners simply challenge alternative holdings, and therefore could not affect the judgment, which rests on independent grounds. In any event, the decision of the court of appeals is correct, and there is no conflict among the circuits on the issues raised in this case. Accordingly, review should be denied.

1. Petitioners claim that the district court erred in conducting a hearing pursuant to Rule 43(e) to resolve disputed issues of fact in order to determine whether Sato exhausted his administrative remedies, Pet 13-15, and that there is a conflict among the circuits on this issue.[7] Neither claim is correct. It is not disputed that a hearing pursuant to Rule 43(e) is appropriate to resolve jurisdictional and related motions. See generally 9 Charles Alan Wright et al., *Federal Practice and Procedure* § 2416 (2d ed. 1995); see also *Spivey* v. *United States*, 912 F.2d 80, 84 (4th Cir. 1990); *Ritza* v. *International Longshoremen's & Warehousemen's Union*, 837 F.2d 365, 369 (9th Cir. 1988); *Stewart* v. *RCA Corp.*, 790 F.2d 624, 628 (7th Cir. 1986). The exhaustion issue that was referred to a hearing in this case is a quasi-jurisdictional issue. See *Champagne* v. *Schlesinger*, 506 F.2d 979, 982 (7th Cir. 1974).

*Ritza* held that jurisdictional motions or related motions, including a motion to dismiss for failure to exhaust administrative remedies, are governed by the general motion provisions in the federal rules, "including Rule 43(e)." See *Ritza*, 837 F.2d at 369. In an effort to establish that *Ritza* conflicts with the decisions of other circuits on this issue, petitioners refer to several cases; however, none are to the contrary. *Bayer* v. *United States Department of the Treasury*, 956 F.2d 330 (D.C. Cir. 1992), does not interpret or otherwise mention Rule 43(e). *Spivey* affirmed that the Rule is generally "used to resolve preliminary issues in connec-

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[7] The petition refers both to the "timeliness" of a discrimination complaint and to the "exhaustion of administrative remedies." Pet. 13. The issue in this case is exhaustion; the agency did not allege that Sato's discrimination complaint was untimely filed with the district court.

tion with jurisdictional or related types of motions." *Spivey*, 912 F.2d at 84. Pet. 13.

*Stewart*, like *Spivey*, held that a hearing pursuant to Rule 43(e) can be held to resolve a number of motions that are decided by the court alone, including a motion to dismiss for lack of jurisdiction. See *Stewart*, 790 F.2d at 628. While *Stewart* states that a court should not "receive and weigh oral and written evidence" and resolve factual disputes pursuant to Rule 43(e), the court's concern was not "that the judge called a hearing," but that he resolved "a factual dispute on a motion for summary judgment." *Stewart*, 790 F.2d at 628, 629. Thus, the reservations expressed in *Stewart* are irrelevant to this case. The district court denied the agency's motion for summary judgment; it did not hold a hearing pursuant to Rule 43(e) to resolve it. Pet. App. A153. Even if the district court had done so, where, as here, the judge is to be the fact-finder of the case as a whole (Pet. App. A156 n.1), the court can hold a hearing to resolve a factual dispute, even on summary judgment. *Stewart*, 790 F.2d at 629.

2. Petitioners argue that the district court erred in dismissing Nakamura's claims of retaliation by supervisors and co-workers from April to September 1993 because Nakamura failed to file a written appeal with the Equal Employment Opportunity Commission. Pet. 16-17. Even if the district court erred in implying that a written appeal is required, cf. *Saksenasingh* v. *Secretary of Education*, 126 F.3d 347, 351 (D.C. Cir. 1997), further review is unwarranted, for it can give petitioners no relief. The district court's challenged holding was the fourth independent basis for its decision to dismiss the 1993 retaliation claims. Nakamura does not challenge the three alternative holdings: that those claims were settled by an agreement on February

14, 1994, that the agency did not breach; that if the agency had breached, Nakamura failed to exhaust his administrative remedies because he did not file his complaint within 30 days after learning of the breach, as 29 C.F.R. 1614.504 requires; and that if that requirement could be excused, he did not pursue the regulation's additional requirements by filing a complaint with the Washington office of the National Park Service. Pet. App. A41-A44. Thus, even if the fourth basis was mistaken, review of petitioners' claim is not warranted.

3. Petitioners challenge the district court's dismissal of Nakamura's retaliatory termination claim (following a jury verdict in his favor), for lack of jurisdiction pursuant to Rule 12(h)(3), because Nakamura failed to present that claim to the agency, and thus failed to exhaust his administrative remedies. Prior to trial, the district court had denied the agency's motion for summary judgment dismissing Nakamura's retaliatory termination claim on the same grounds. Petitioners contend that the dismissal conflicts with the Ninth Circuit's holding in *Sosa* v. *Hiraoka*, 920 F.2d 1451 (1990), and that it is barred by the "law of the case" doctrine. Pet. 16-18. Neither contention warrants review and neither is correct.

The district court properly applied *Sosa*. It inquired whether an agency investigation of Nakamura's administrative complaints could reasonably have been expected to encompass the additional claim of retalitory termination made in the court complaint. See Pet. App. A60-A62; *Sosa*, 920 F.2d at 1456. Based on the evidence presented prior to and during trial, the court concluded that an agency investigation could not have been expected to reach that additional claim, given the nature of Nakamura's administrative complaints. Pet.

App. A62-A63. This narrow, fact-bound holding does not warrant this Court's review.

The "law of the case" doctrine does not bar the district court's conclusion. As petitioners acknowledge, courts may change their own prior rulings at their discretion (Pet. 16) unless a party is prejudiced by his reliance on the prior ruling. See *Williams* v. *Runyon*, 130 F.3d 568, 573 (3d Cir. 1997). While prejudice may occur when a litigant alters his trial strategy in reliance on the prior ruling and is thereby deprived of an opportunity to present evidence on the issue in question to the jury (see *ibid.*), Nakamura could not have suffered such prejudice. He had no evidence that he had exhausted his administrative remedies with respect to his retaliatory termination claim; he argued to the district court that he was not required to do so, due to the similarity of the claims he raised in his administrative complaints. Pet. App. A59-A60. Even if the district court erred in granting the agency's motion to dismiss pursuant to Rule 12(h)(3), the court also found, in the alternative, that the agency was entitled to judgment as a matter of law pursuant to Rule 50, on that claim. *Id.* at A68 n.6.

4. Petitioners also claim that the district court erred in granting the agency's motion for judgment as a matter of law because Nakamura failed to show that the agency's legitimate, nondiscriminatory reason for terminating him was a pretext for discrimination. They argue that a reasonable jury could have found retaliatory termination and pretext. Pet. 18-20. Petitioners also claim there exists a conflict among the circuits as to the consequence of a showing of pretext. Pet. 22. Neither argument is correct, and neither justifies further review.

The district court's holding that Nakamura failed to show pretext is based on the specific facts of this case

and has no implication beyond them. The court did not simply substitute its judgment for the jury's, as petitioners imply. Pet. 18-19. It explicitly stated that it could not "assess the credibility of witnesses, resolve conflicting evidence, or otherwise substitute its conclusions for that of the jury." Pet. App. A74. It carefully analyzed the evidence, *id.* at A77-A111, and concluded that it permitted only one reasonable conclusion when viewed most favorably to Nakamura—that Nakamura failed to produce specific, substantial evidence that the agency's legitimate, nondiscriminatory, budgetary justification for terminating him was a pretext for discrimination. *Id.* at A98-A99. Judgment as a matter of law was therefore appropriate.

After finding that Nakamura had failed to present sufficient evidence of pretext, the district court noted that even if he had shown pretext, in addition to his prima facie case, he "still failed to sustain his ultimate burden of proving intentional discrimination with respect to his termination [and] * * * failed to present any evidence of retaliatory intent on the part of [the agency] in terminating [him]," thereby entitling the agency to judgment as a matter of law. Pet. App. A100.

Petitioners assert that the district court's approach to the implications of a showing of pretext conflicts with that of the Third and Sixth Circuits. See Pet. 22. In those circuits, once a plaintiff has established a prima facie case and pretext, he may survive judgment as a matter of law, because "a jury is permitted, [though] not required, * * * to conclude that there was intentional discrimination." *Sheridan* v. *E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1066-1067 (3rd Cir. 1996), cert. denied, 521 U.S. 1129 (1997); *Kline* v. *Tennessee Valley Auth.*, 128 F.3d 337, 352 (6th Cir. 1997) (cited by petitioner). The holding below is not to the

contrary, however, because the court of appeals held that as Nakamura never established pretext, judgment as a matter of law was correct. Pet. App. A4. There is no conflict among the circuits on this issue and this decision does not warrant this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1999